IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

RICHARD D. ROBERTS, Defendant below, Appellant, vs. MICHAEL SHAHAN, Director of DIVISION OF MOTOR VEHICLES, DEPARTMENT OF TRANSPORTATION, Plaintiff below, Appellee.	:	C.A. NO. 04-03-006

Submitted: March 26, 2009

Decided: March 26, 2009

On appeal from Division of Motor Vehicles

Affirmed.

Eric G. Mooney, Esquire, 11 South Race Street, Georgetown, Delaware 19947, Attorney for Appellant.

Frederick Schranck, Esquire, Department of Transportation, Post Office Box 778, Dover, Delaware 19903-0778, Attorney for Appellee.

Trader, J.

In this civil appeal from the Division of Motor Vehicles, Department of Public Safety, (Division) I hold that that the hearing officer was correct in determining that there was probable cause that the defendant was driving a motor vehicle under the influence of alcohol and that the Division has also established by a preponderance of the evidence that he was driving under the influence of alcohol. Accordingly, the decision of the hearing officer is affirmed.

The relevant facts are as follows: On June 27, 2003, in Delmar, Sussex County, Delaware, Corporal Bryant of the Delaware State Police clocked a vehicle on his radar at a speed of 78 M.P.H. in a 55 M.P.H. zone. He stopped the motor vehicle and when he contacted the driver, he smelled a strong odor of alcoholic beverage coming from his breath. He noted that the defendant's actions were slow and lethargic and his speech was mumbled and slurred. The defendant told the police officer that he had two beers and then he said four beers. At this time, Cpl. Bryant conducted certain field sobriety tests. The first test given to the defendant was the horizontal gaze nystagmus test. The test revealed a total of six clues and the police officer determined that it was a failure. On the walk and turn test, he took eleven steps on the first nine steps and twelve steps on the second nine steps. On the walk and turn test, he lost his balance and stumbled with his arms up, and continually stepped off the line. On the one-leg stand test, the defendant could not complete the test and it was considered a failure.

At the hearing before the administrative agency, the hearing officer found that there was probable cause to believe that the defendant was driving under the influence of alcohol. The Division also established by the preponderance of the evidence that the defendant was driving under the influence of alcohol.

"The scope of review of an appeal from an administrative decision of the Division of Motor Vehicles is limited to correcting errors of law and determines whether substantial evidence of record exists to support the findings of fact and conclusions of law." *Eskridge v. Voshell*, 593 A.2d 589 (Table) 1991 WL 78471 at *2 (Del.) (citations omitted). Findings of fact will not be overturned on appeal as long as they are sufficiently supported by the record and are the product of orderly and logical deductive process. *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972). If there is substantial evidence in the record, the "court may not reweigh it and substitute its own judgment" for the judgment of the agency. *Janaman v. New Castle County Board of Adjustment,* 364 A. 2d 1241, 1242 (Del. Super. Ct. 1976). "The Division's understanding of what transpired," however, "is entitled to deference, since the hearing officer is in the best position to evaluate the credibility of witnesses and the probative value of real evidence." *Voshell v. Attix,* 574 A. 2d 264, 1990 WL 40028, at *2 (Del.).

Probable cause is established when the officer possesses information which warrant a reasonable man to believe that such a crime has been committed.

> To establish probable cause the police are only required to present facts which suggests, when *those facts* are viewed under the totality of the circumstances, that there is a fair probability the defendant has committed a crime. . . The possibility that there may be hypothetically innocent explanation for each of the several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest. *State v. Maxwell*, 624 A.2d 926, 929-30 (Del. 1993).

"Probable cause can be established by the officer's own observation or from hearsay." *Malone v. Voshell,* Del.Super. 1993 WL 489452 at *2 (Oct. 4, 1993) Herlihy. J.

The defendant first contends that there is not probable cause that the defendant was driving a motor vehicle under influence of alcohol. I disagree. The defendant was clocked on radar at a speed of 78 M.P.H. in a 55 M.P.H. zone. He admitted to Cpl. Bryant that he had four beers and he had a strong odor of alcoholic beverage on his breath. His actions were slow and lethargic and his speech was mumbled and slurred. Additionally, he failed all three field coordination tests administered by Cpl. Bryant.

As to the probable cause finding of the hearing officer, the defendant contends that the officer did not lay a proper foundation for the admission of the HGN test. I disagree. At the hearing, Cpl. Bryant presented his certificate for proficiency in DUI detection and standard field sobriety tests, and the HGN test endorsed by the National Highway Traffic and Safety Administration. Given the lesser evidentiary standard needed for a probable cause finding, the Trooper's testimony in this case is more than sufficient foundational evidence. *Cantrell v. Division of Motor Vehicles*, Del. Super., 1996 WL 453425 (Terry, J.) *aff'd* 1997 WL 70816 (Del.).

The defendant next contends the hearing officer failed to demonstrate that she considered all of the evidence presented in her findings of fact, and that the defendant's speech was mumbled and slurred. He argues that the hearing officer failed to specify that she considered that the defendant's dentures could affect the defendant's speech. As is stated in *State v. Maxwell*, the fact that there might be hypothetically innocent explanations for facts revealed during the course of investigation does not preclude a determination of probable cause. *Maxwell*, 624 A.2d at 930.

I conclude that the hearing officer was correct in determining that there was probable cause that the defendant was driving a motor vehicle under the influence of alcohol.

The defendant next contends that the Division has not established by a preponderance of the evidence that he was driving a motor vehicle under the influence of alcohol. I disagree.

The defendant argues that all of the field tests were not demonstrated by the police officer and there is no evidence that the defendant did not follow instructions. There is no legal requirement that the field tests be demonstrated to the defendant. The defendant's performance on field coordination tests is an issue of fact to be decided by the hearing officer. This court must give deference to the hearing officer's findings of facts if supported by substantial evidence and cannot reweigh the evidence. Additionally, there was no objection to this evidence at the hearing. The reviewing court cannot consider this contention since it was not raised before the administrative agency.

Finally, the defendant contends that the hearing officer failed to demonstrate that she considered all of the evidence presented in findings of fact. I disagree. The hearing officer specifically found that the medical documents submitted by the defendant were not considered because those documents constituted dated material several years prior to this incident. "Additionally, the defendant gave no indication to the officer at the time of the stop that he was handicapped by injuries and under a doctor's care for back injuries." A-31 Appellant's Appendix to Opening Brief.

Therefore, the hearing officer was correct in finding the Division has established by a preponderance of the evidence that the defendant was driving a motor vehicle under

the influence of alcohol. Accordingly, the hearing officer's decision is affirmed and the defendant's license is revoked for a period of three months.

IT IS SO ORDERED.

Merrill C. Trader
Judge